United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7586

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P/S

United States Court of Appeals

For the Second Circuit

RED STAR TOWING AND TRANSPORTATION COMPANY,

Plaintiff-Appellant,

against

STATE OF CONNECTICUT and SAMUEL KANELL, Commissioner of Transportation of the State of Connecticut,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JOINT APPENDIX.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1977

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UNITED STATES COURT OF APPEALS

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Relevant Docket Entries.

Date	Proceedings
1975	
11/14	Complaint, filed.
11/14	Civil Cover Sheet, filed.
11/14	Appearances of Gregory P. Lynch, Esq., entered for plaintiff.
11/14	Summons issued and, together with attested copies of same, copies of complaint and Form 285 (1), forwarded to Marshal for Service.
12 /2	Marshal's return showing service, filed.—Summons/Complaint. (Kanell, Ajello—11/26/75)
12/24	Appearance of Dion W. Moore, Esq., entered for defts.
12/24	Answer and Special Defense, filed.
1976	
1/ 5	Defendants' Motion To Dismiss, filed.
1/ 5	Memorandum In Support Of Motion To Dismiss, filed.

Relevant Docket Entries

1/ 9	Stipulation, filed by parties that date for pltf. to file memo. in opposition to defts.' Mtn. to Dismiss be extended to Jan. 28, 1976.
1/28	Plaintiff's Memo. in Opposition to Motion to Dismiss, filed. Req. for oral argument.
2/ 2	Reply Memorandum In Support Of Motion To Dismiss, filed by defts.
2/23	Per Misc. Cal. of RCZ—Defts.' Motion to Dismiss—Off, by agreement. m-2/20/76.
10/26	Ruling on Defendants' Motion to Dismiss, filed and entered. Since plaintiff is precluded by the Eleventh Amendment from suing defendants in this Court, the defendants' motion to dismiss complaint is granted. Zampano, J. M-10/27/76. Copies to counsel, TEC, MJB, RCZ, JON, JEL, AHL, FOE, P Conn. Law Rev.
10/28	Judgment, entered, in favor of defendants and action dismissed. Markowski, C. M-10/28/76. Copies to counsel.
11/24	Plaintiff's Notice of Appeal from Judgment, filed. Copies to Atty. Clancy and Atty. Moore.
11/24	Civil Appeals Management Plan and Forms C and D handed to Atty. Lynch for Atty. Clancy.
11/24	Check No. 35519 in amount of $250.00 issued by firm of Clancy, Kenney and Scofield as Bond for Costs on Appeal received.
11/24	Certified copies of Notice of Appeal and Docket Entries forwarded Clerk, U. S. Court of Appeals.
12/ 1	Acknowledgment of receipt of copies of Notice of Appeal and Docket Entries received from Clerk, U. S. Court of Appeals.
12/10	Copy of Civil Appeal Scheduling Order from U. S. Court of Appeals, filed. (Record on Appeal due on or before 12/23/76)

Opinion.

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT.

Ruling on Defendants' Motion to Dismiss

Red Star Towing and Transportation Company, a West Virginia corporation, brought this suit in admiralty against the State of Connecticut and its Commissioner of Transportation, to recover for losses resulting from the collision of a barge with an abutment of the Tomlinson Bridge which is owned by the State and spans the Quinnipiac River in New Haven, Connecticut. Plaintiff alleges that the collision was due to defendant's negligence in failing to open the Tomlinson Bridge in response to proper signals from plaintiff's barge so as to permit safe passage. Jurisdiction in this Court is premised on 28 U.S.C. §1333.

The defendants move to dismiss the complaint on the ground that the doctrine of sovereign immunity deprives the Court of jurisdiction over the defendants. The defendants contend that plaintiff's avenues of relief are exclusively available either by adminisrative procedures or by way of a state court action, i. e., 1) obtaining the consent of the Commission on Claims to bring an action againt the State, Conn. Gen. Stat. §4-141 *et seq.*,[1] or, 2) securing damages for injuries sustained on defective

[1]Conn. Gen. Stat. §4-160 states in part:

> "(a) When the commission deems it just and equitable, it may authorize suit against the state on any claim for more than twenty-five hundred dollars which, in the opinion of the commission, presents an issue of law or fact under which the state, were it a private person, could be liable."

highways, bridges or sidewalks in the state highway system, Conn. Gen. Stat. §13a-144.[2]

On the other hand, the plaintiff argues that the State has impliedly waived its sovereign immunity under the Eleventh Amendment through its construction and maintenance of an interstate bridge within the federal realm of interstate commerce. For the following reasons, the Court is of the opinion that the claim against the defendants is barred by the Eleventh Amendment, and therefore, the complaint must be dismissed.

It is settled that the Eleventh Amendment bar suits brought by individuals in the federal courts against an unconsenting state.[3] It is also clear that, although the Amendment speaks only of suits "in law or equity," the immunity extends to suits in admiralty, *Ex parte New York*, 256 U. S. 490 (1921); *Huckins v. Board of Regents of University of Michigan*, 263 F. Supp. 622 (E. D. Mich. 1967); and therefore, claims asserted under the general maritime law of tort are barred by the Eleventh Amendment. See *Copper S. S. Co. v. State of Michigan*, 194 F. 2d 465 (6 Cir. 1952); *Prendergast v. Long Island State Park Commission*, 330 F. Supp. 438 (E.D.N.Y. 1970).

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[2]Conn. Gen. Stat. §13a-144 specifies in part:

> "Any person injured in person or property through the neglect or default of the state or any of its employees by means of any defective highway, bridge or sidewalk which it is the duty of the commissioner of transportation to keep in repair * * * may bring a civil action to recover damages sustained thereby against the commissioner in the superior court or, in any case within its jurisdiction, the court of common pleas."

[3]The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Subjects of any Foreign State."

Plaintiff relies on the principle enunciated in *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964) and *Petty v. Tennessee-Missouri Bridge Commission*, 359 U. S. 275 (1959), that "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." *Parden v. Terminal R. Co., supra* at 196. It argues that when Connecticut subjected itself to the supervision and control of the United States by building the Tomlinson Bridge above a navigable waterway, see Bridge Act of 1906, §1 *et seq.*, 33 U. S. C. §491 *et seq.*, it also exposed itself to suits by private parties impiedly authorized by the Act. See *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 259 F. Supp. 633 (E. D. Va. 1966), aff'd 404 F. 2d 1001 (4 Cir. 1968).

However, there are compelling authorities which support the defendants' contention that mere entry into a field controlled by federal legislation does not, in and of itself, constitute a waiver of a state's immunity from suit. Three requirements must be met before a state may be held to have impliedly waived its protection under the Eleventh Amendment: (1) state participation in an area subject to federal legislation; (2) the existence of a private civil cause of action within the applicable legislation; and (3) evidence that Congress intended to include states within the class of defendants subject to liability under the legislation in question. *Williamson Towing Co., Inc. v. State of Illinois*, 396 F. Supp. 431, 436 (E. D. Ill. 1975). See also *Edelman v. Jordan*, 415 U. S. 651, reh. denied, 416 U. S. 1000 (1974); *Daye v. Commonwealth of Pennsylvania*, 483 F. 2d 294 (3 Cir. 1973); *Dawkins v. Craig*, 483 F. 2d 1191 (4 Cir. 1973), cert. denied, 415 U. S. 938 (1974); *Intracoastal Transportation Inc. v. Decatur County, Georgia*, 482 F. 2d 361 (5 Cir. 1973); *Burgess v. M/V Tamano*, 382 F. Supp. 351 (D. Maine 1974); *Citizens for Hudson Valley v. Volpe*, 297 F. Supp. 809 (S.D.N.Y. 1969).

In the present case, a careful examination of the various provisions of the Bridge Act of 1906, 33 U. S. C. §491 *et seq.* discloses no indication of any intent by Congress to permit individuals to sue a state in the federal courts for violations of the Act. The Bridge Act of 1906 creates no private civil cause of action; only the United States is authorized to enforce the Act's penal sanctions. See 33 U. S. C. §§ 494, 495 (1970);[4] *Williamson Towing Co., Inc. v. State of Illinois, supra* at 436; *Red Star Towing and Transportation Co. v. Department of Transportation of New Jersey*, 423 F. 2d 104 (3 Cir. 1970); cf. *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F. 2d 81 (2 Cir. 1972); but see *Chesapeake Bay Bridge and Tunnell District v. Lauritzen, supra.*

Thus, the State of Connecticut did not waive its immunity from suits by private parties by constructing and operating a bridge in interstate commerce. See *Intracoastal Transportation, Inc. v. Decatur County, Georgia, supra; Red Star Towing and Transportation Co. v. Department of Transportation of New Jersey, supra;* cf.

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[4]Section 494 declares in part:

> "* * * The persons owning or operating any such bridge shall maintain, at their own expense, such lights and other signals thereon as the Commandant of the Coast Guard shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft."

Section 495 provides in part:

> "Any person who shall fail or refuse to comply with the lawful order of the Secretary of the Army or the Chief of Engineers, made in accordance with the provisions of sections 491 to 498 of this title, shall be deemed guilty of a violation of said sections, and any person who shall be guilty of a violation of said sections, shall be deemed guilty of a misdemeanor * * *."

J. W. Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140 (N. D. Ala. 1971), aff'd 456 F. 2d 1294 (1972), cert. denied, 410 U. S. 946, reh. denied 411 U. S. 910 (1973). As the Supreme Court said in *Edelman v. Jordan, supra* at 673-674:

> "And while this Court has, in cases such as *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964), authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant."

The Court's decision to dismiss plaintiff's complaint should not be construed to foreclose its attempt to recover from the State of Connecticut under the provisions of Conn. Gen. Stat. §§ 4-14 *et seq.* or 13a-144. It would appear that plaintiff may proceed against the State pursuant to these statutes, and in the course of such proceedings assert the standard of care imposed by the Bridge Act of 1906 on bridge operators. See *Morania Barge No. 140, Inc. v. M. & J. Tracy, Inc.*, 312 F. 2d 78 (2 Cir. 1962); *Circle Line Sightseeing Yachts v. City of New York*, 283 F. 2d 811 (2 Cir. 1960); cf. *Nassau County Bridge Auth. v. Tug Dorothy McAllister*, 207 F. Supp. 167 (E.D.N.Y. 1962), aff'd 315 F. 2d 631 (2 Cir. 1963).

Accordingly, since plaintiff is precluded by the Eleventh Amendment from suing defendants in this Court, the defendants' motion to dismiss the complaint is granted.

Dated at New Haven, Connecticut, this 26th day of October, 1976.

ROBERT C. ZAMPANO
United States District Judge

Judgment.

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT.

This cause having come on for consideration on defendants' Motion To Dismiss and the Court having filed its Ruling On Defendants' Motion To Dismiss under date of October 26, 1976, granting said motion,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants and the instant action is dismissed.

Dated at Bridgeport, Connecticut, this 28th day of October, 1976.

SYLVESTER A. MARKOWSKI
Clerk

By: VINCENT R. DEROSA
Deputy-in-Charge

(Seal.)

Complaint.

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT.

Plaintiff, by its attorneys, Clancy, Kenney & Scofield, for its complaint herein, respectfully alleges upon information and belief as follows:

FIRST: This is a case of Admiralty and Maritime jurisdiction as hereinafter more fully appears.

SECOND: This is an Admiralty and Maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

THIRD: At all times hereinafter mentioned, plaintiff was and still is a corporation organized and existing under the laws of the State of West Virginia with an office and place of business at 500 Fifth Avenue, New York, N. Y. 10017.

FOURTH: At all times hereinafter mentioned, plaintiff owned, operated, managed and controlled the tug Ocean King.

FIFTH: At all times hereinafter mentioned, the State of Connecticut, through its Department of Transportation, owned, operated, maintained and controlled the Tomlinson Bridge which spans the Quinnipiac River in the City of New Haven, Connecticut.

SIXTH: On or about September 23, 1974, at 1015 hours, the tug Ocean King was in collision with an abutment of the Tomlinson Bridge.

SEVENTH: Said collision was due solely to the negligence of defendant in that the persons in charge failed to open the Tomlinson Bridge in response to proper signal

from the tug Ocean King so as to permit the safe passage of said Ocean King, all in violation of Title 33, Code of Federal Regulations, Section 117.120, and in other respects which will be pointed out at the time of trial.

EIGHTH: By reason of the aforesaid, plaintiff has suffered damages in the amount of $35,000.00, no part of which has been paid.

NINTH: All and singular, the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of $35,000.00 together with interest, costs and disbursements and that it may have such other and further relief as the Court may deem just and proper.

CLANCY, KENNEY & SCOFIELD
By:

Attorneys for Plaintiff
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Bridgeport, Conn. 06604

McHUGH, HECKMAN, SMITH & LEONARD
Office & P. O. Address
80 Pine Street
New York, N. Y. 10005

Answer and Special Defense.

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT.

1. The allegations of paragraph first are denied.

2. The allegations of paragraph second are denied.

3. As to the allegations contained in paragraph third, the defendants do not have sufficient knowledge or information with which to form a belief and therefore deny the same and leave the plaintiff to its proof.

4. As to the allegations contained in paragraph fourth, the defendants do not have sufficient knowledge or information with which to form a belief and therefore deny the same and leave the plaintiff to its proof.

5. As to the allegations contained in paragraph fifth, the defendants do not have sufficient knowledge or information with which to form a belief and therefore deny the same and leave the plaintiff to its proof.

6. As to the allegations contained in paragraph sixth, the defendants do not have sufficient knowledge or information with which to form a belief and therefore deny the same and leave the plaintiff to its proof.

7. The allegations of paragraph seventh are denied.

8. The allegations of paragraph eighth are denied.

9. The allegations of paragraph ninth are denied.

FIRST SPECIAL DEFENSE:

This Court does not have jurisdiction over the subject matter of the action.

Answer and Special Defense

SECOND SPECIAL DEFENSE:

The plaintiff has failed to state a claim upon which this Court may grant relief.

THIRD SPECIAL DEFENSE:

This Court does not have jurisdiction over the person.

FOURTH SPECIAL DEFENSE:

The State of Connecticut and the Commissioner of Transportation of the State of Connecticut are immune from suit by virtue of the doctrine of sovereign immunity.

THE DEFENDANTS,
By DION W. MOORE
Pullman, Comley, Bradley & Reeves
855 Main Street
Bridgeport, Connecticut 06604

Defendants' Motion to Dismiss.

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT.

The defendants, State of Connecticut and Samuel Kanell, Commissioner of Transportation of the State of Connecticut, hereby move the Court pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss the plaintiff's complaint filed November 14, 1975 on the grounds that by virtue of the doctrine of sovereign immunity this Court has no jurisdiction over the subject matter of the action or the persons of the defendants.

THE DEFENDANTS,
By DION W. MOORE
Pullman, Comley, Bradley & Reeves
855 Main Street
Bridgeport, Connecticut 06604

Defendants' Memorandum in Support of Motion to Dismiss.

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT.

STATEMENT OF CASE

This action against the State of Connecticut and the Commissioner of Transportation claims damages by virtue of a collision of the tug Ocean King owned by the plaintiff, Red Star Towing and Transportation Company, with a bridge over navigable waters owned and operated by the State of Connecticut. Jurisdiction purports to be based upon an admiralty and maritime claim.

STATEMENT OF LAW

"An unconsenting state is immune from suits brought by individuals under the admiralty jurisdiction of the federal courts." *Red Star Tow. & Transp. Co. v. Department of Transp. of N. J.*, 423 F. 2d 104 (3rd Cir. 1970). Absent consent, the Eleventh Amendment of the Constitution precludes suits against a state under the general maritime law. *Huckins v. Board of Regents of University of Michigan*, 263 F. Supp. 622 (1967).

The only exception to this rule is where a state waives its immunity by entering into an area governed by federal regulatory agencies which federal regulation creates in a private individual a civil cause of action. *Red Star Tow. & Transp. Co. v. Department of Transp. of N. J., supra.*

There are no allegations in the instant complaint which present either exception to the general rule. The Third Circuit was presented with the same situation in *Red Star Tow. & Transp. Co. v. Department of Transp. of N. J., supra,* in which case the state constructed and operated the Witt-Penn Bridge over a navigable waterway. The plaintiff in that case brought suit in admiralty against the Department of Transportation of New Jersey to recover

losses resulting from the collision of a barge with a fender system of the Witt-Penn Bridge. The Court discussed immunity and the waiver and affirmed the lower court's dismissal of the complaint based upon the fact that no private right was created under the federal regulatory procedure which would override the general Eleventh Amendment provision that the judicial power of the United States does not extend to any suit by a citizen against one of the several states absent consent or waiver.

For the foregoing reasons, it is respectfully requested that the complaint be dismissed.

THE DEFENDANTS,
By DION W. MOORE
Pullman, Comley, Bradley & Reeves
855 Main Street
Bridegport, Connecticut 06604

Plaintiff's Memorandum in Opposition to Motion to Dismiss.

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT.

STATEMENT.

This case is before the Court on the grounds of its admiralty and maritime jurisdiction and is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. Plaintiff contends that it is a West Virginia corporation with an office and place of business in New York City and at all material times was the owner and operator of the tug Ocean King.

Plaintiff's Memorandum in Opposition to Motion to Dismiss

It is plaintiff's further contention that the State of Connecticut, through its Department of Transportation, owned, operated, maintained and controlled the Tomlinson Bridge which spans the Quinnipiac River in the City of New Haven, Connecticut. It is plaintiff's claim that on or about September 23, 1974, at 1015 hours, the tug Ocean King was in collision with an abutment of the Tomlinson Bridge sustaining serious damage thereby. Plaintiff avers that said collision was due solely to the negligence of defendants in that the persons in charge failed to open the Tomlinson Bridge in response to proper signal from the tug Ocean King so as to permit the safe passage of said tug, all in violation of 33 C.F.R. 117.120* and in other respects which will be pointed out at the time of trial.

In its answer, defendants deny the admiralty and maritime jurisdiction of this Court or that the within is an admiralty and maritime claim and those paragraphs of the complaint which allege that the collision was caused

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*33 C.F.R. 117.120 reads, in part, as follows:

"§117.120 New Haven Harbor, Quinnipiac and Mill Rivers, Conn.: bridges owned and operated by the State of Connecticut and City of New Haven.

(a) The regulations in this section shall govern the operation of Chapel Street Bridge across Mill River, and Tomlinson Bridge, Ferry Street and Grand Avenue Bridges across Quinnipiac River.

(b) The owners of or agencies controlling the above-named bridges shall provide the appliances and personnel necessary for the safe, prompt, and efficient operation of the draws.

(c) The draw of each bridge shall be opened when the prescribed signal for the opening of the draw is received from an approaching vessel or other watercraft which cannot pass under the closed draw, except as hereinafter provided.

• • •

by the negligence of defendants or that plaintiff suffered damage thereby. Defendants deny having sufficient knowledge or information with which to form a belief with respect to the allegations concerning corporate existence and ownership of plaintiff or that the State of Connecticut, through its Department of Transportation, owned, operated, maintained and controlled the Tomlinson Bridge. The defendants further deny having sufficient knowledge or information concerning the alleged collision between the tug Ocean King with an abutment of the Tomlinson Bridge.

Defendants also interpose four special defenses which, in effect, can be treated as one for the purpose of this motion. The first is that the Court does not have jurisdiction over the subject matter of the action. The second is that plaintiff has failed to state a claim upon which this Court may grant relief. The third is that this Court does not have jurisdiction over the persons of the defendants and the fourth is that defendants are immune from suit by virtue of the doctrine of sovereign immunity.

In its moving papers, defendants state that application is being made to dismiss the complaint on the grounds that by virtue of the doctrine of sovereign immunity, this Court has no jurisdiction over the subject matter of the action or the persons of the defendants.

(footnote continued):

(e) *Signals*—(1) *Call signals for opening of draw*—(i) *Sound signals.*

Tomlinson Bridges, two short blasts of horn or whistle.

• • •

(2) *Acknowledging signals*—(i) *By bridge operator*—(a) *Sound signals.* Draw to be opened immediately: Same as call signal. Draw cannot be opened immediately, or if open, must be closed immediately. Two long blasts of a horn or whistle, to be repeated at regular intervals until acknowledged by the vessel.

• • •

Plaintiff's Memorandum in Opposition to Motion to Dismiss

POINT I

PLAINTIFF'S ALLEGATIONS IN THE COMPLAINT ARE DEEMED ADMITTED

For the purposes of a motion pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss the complaint for lack of jurisdiction over the subject matter or the persons of the defendants and for failure to state a claim on which relief can be granted, the facts as alleged are assumed to be true, *Rosenblatt v. Am. Cyanamid Co.*, 86 S. Ct. 1, 15 L. Ed. 2d 39, 41 (1965). Of course, it is recognized that this is not to be regarded as to any intimation as to the merits which are yet to be adjudicated. See also, *Lumbermen's Mutual Casualty Co. v. Borden Co.*, 241 F. Supp. 683 (S.D.N.Y. 1965) at p. 691, and *Arzee Supply Corp. of Conn. v. Rubberoid Co.*, 222 F. Supp. 237 (D. Conn. 1963) at p. 240.

POINT II

ADMIRALTY AND MARITIME JURISDICTION

A complaint for damage to a tug as a result of negligence in the maintenance and operation of a drawbridge over navigable waters stated a cause of action for a maritime tort within the maritime and admiralty jurisdiction of the United States District Court, *James McWilliams Blue Line v. City of Norwalk, Con.*, 81 F. Supp. 818 (D. Conn. 1948). See also, *Conklin v. City of Norwalk, Conn.*, 270 Fed. 68 (C.A. 2d 1920), *Empire Seafoods, Inc. v. Anderson*, 398 F. 2d 204 (C.A. 5th 1968), cert. den'd 393 U. S. 983, 89 S. Ct. 449, 21 L. Ed. 2d 444 (1968), *O'Keefe v. Staples Coal Corp.*, 201 Fed. 131 (D. Mass. 1910), *Circle Line Sightseeing Yachts, Inc. v. City of New York*, 283 Fed. 2d 811 (C.A. 2d 1960), and *Moyer Boat Works, Inc. v. Bright Marine Basin, Inc.*, 265 F. Supp. 352 (E.D.N.Y. 1966).

Cf. 28 U.S.C. 1333 (1) and 46 US.C. 740.3.

Plaintiff's Memorandum in Opposition to Motion to Dismiss

POINT III

THE STATUTE OF LIMITATIONS OF THE STATE OF CONNECTICUT IS TWO YEARS

§52-854 (Limitation of Action for Injury to Person or Property) of the Connecticut General Statutes reads, in part, as follows:

> "No action to recover damages for injury to • • • person or property caused by negligence or by wreckless or wanton misconduct, • • • shall be brought but within two years from date when the injury is first sustained or discovered • • •".

POINT IV

THE STATE OF CONNECTICUT HAS WAIVED ITS SOVEREIGN IMMUNITY

Chapter 53 of the Connecticut General Statutes is titled "Claims Against the State". As used in Chapter 53, "claim means a petition for the payment or refund of money by the State or for permission to sue the State", §4-141. "There shall be a commission on claims which shall hear and determine all claims against the State • • •". §4-142. "When the commission deems it just and equitable, it may authorize suit against the State on any claim for more than twenty-five hundred dollars which, in the opinion of the commission, presents an issue of law or fact under which the State, were it a private person, could be liable." §4-160.

Plaintiff's Memorandum in Opposition to Motion to Dismiss

In addition to the foregoing, there is also a limitation on the presentation of claims. "No claim shall be presented under this Chapter but within one year after it accrues. Claims for injury to person or damage to property shall be deemed to accrue on the date when the damage or injury is sustained or discovered or in the exercise of reasonable care should have been discovered, provided no claim shall be presented more than three years from the date of the act or event complained of." §4-148(a). Also, §4-148(b) provides that no claim cognizable by the commission on claims shall be presented against the State except under the provisions of this Chapter.

See also, *Sarges v. State*, 26 Conn. Sup. 24 (1965).

POINT V

THE EXISTENCE OF A CLAIM RECOGNIZED UNDER ADMIRALTY AND MARITIME LAW PRECLUDES THE OPERATION OF ANY RESTRICTING STATE STATUTES

In *Workman v. The City of New York*, 179 U. S. 552, 21 S. Ct. 212, 45 L. Ed. 314 (1900), the Supreme Court of the United States refused to be guided by a New York law in determining the liability of the City of New York for a maritime tort involving negligent navigation by one of its Fire Department employees. The City had interposed the defense of sovereign immunity. The Court stated the following at p. 570:

> "It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction. This being so, it follows that as the municipal corporation of the city of New York, unlike a sovereign,

> was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case at bar, because of the public nature of the service upon which the fireboat was engaged—even if such claim for the purposes of the case be conceded—was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admiralty for the wrong which the courts below both found to have been committed."

In the *Workman* case, the Supreme Court recognized that the City of New York, a municipal corporation, does not enjoy the immunity of a sovereign state and therefore is subject to the admiralty jurisdiction of the federal court. Consequently, it was liable for a maritime tort even though state law would have dismissed the complaint because the city was a municipality. Likewise, even though state law may require a notice of claim and/or presentation within a certain time limit, the federal court will ignore these requirements and apply only the rule of laches to the filing of suit because of the admiralty nature of the incident. In *Young v. The Key City*, 14 Wall. 653, the Supreme Court of the United States refused to apply a state statute of limitation, but applied laches in an admiralty case.

The Supreme Court concluded in *Workman* that it would not make one rule for negligence in a maritime tort where the city is the employer and another rule in a maritime tort where a private person is the employer. This ruling by the Supreme Court was made in order to preserve the uniformity of the admiralty and maritime law. The admiralty and maritime law would allow a recovery against the employer of a negligent bridge tender under the doctrine of *respondeat superior* in the event that the employer

was a private person, see *Missouri River Packet Co. v. The Hannibal & St. Joseph Railroad,* 2 Fed. 85 (W. D. Missouri 1880), and *Southern Transportation Co. v. Philadelphia, B. & W. R. Co.,* 196 Fed. 548 (D. Md. 1912).* The effect of the *Workman* decision is to apply the same doctrine where a municipality is the employer of the negligent bridge tender.

The present case is also controlled by the decision in *Frame v. the City of New York,* 34 F. Supp. 194 (S. D. N. Y. 1940), *Morales v. the City of Galveston,* 181 F. Supp. 202 (S. D. Tex. 1959), and *Rogers v. the City of New York,* 46 Misc. 2d 373, 259 N. Y. S. 2d 604 (St. Ct. N. Y. Co. 1965).

In the latter case, the following was stated at pp. 375-376:

> "• • • plaintiffs' rights are rooted not in state law but in federal maritime law, bears directly on the question of the amenability of the City of New York to suit, which the General Municipal Law purports to resolve. It was early decided by the U. S. Supreme Court that the City of New York has no 'independent sovereign immunity' (to be waived conditionally or otherwise), so that the City is amenable to suit in an admiralty court to

*There is also much other authority for the view that the bridge is liable for its breach of its Congressional license, *Wyandotte Transportation Co. v. U. S.*, 389 U. S. 191, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967) and *U. S. v Perma Paving Co.*, 332 Fed. 2d 754 (C.A. 2d 1964).

> answer for the commission of a maritime tort (*Workman v. City of New York, Mayor, etc.*, 179 U. S. 552, 21 S. Ct. 212, 45 L. Ed. 314; see also *Ex parte State of New York*, No. 2, 256 U. S. 503, 41 S. Ct. 592, 65 L. Ed. 1063). • • •
>
> It is defendant's contention that the limitation provision contained in the state statute must be given effect by this court, while it is clear that the same would not be applied in an identical suit brought on the admiralty side of federal court. This argument, at least insofar as it relates to substantive admiralty rights, has been unequivocally rejected by the U. S. Supreme Court (*Pope & Talbot, Inc., v. Hawn, supra*, 346 U. S. 406 at p. 411, 74 S. Ct. 202).
>
> A further and possibly more compelling reason for rejecting defendant's argument is that the state limitations provision here involved would, if given effect, violate the settled rule of law that state provisions may not so operate as to work a material prejudice to the application of maritime law or interfere with the uniformity thereof (*Workman v. City of New York, Mayor, etc., supra; Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086) • • •".

The rule recited in *Rogers, supra*, is followed by both the federal and state courts sitting within the State of New York. Thus, in *Sevits v. McKorman-Terry Corp.*, 264 F. Supp. 810 (S. D. N. Y. 1966), which concerned an action for injury sustained aboard a naval vessel by reason of an allegedly defective aircraft engine, the court, in discussing the validity of the cause of action, noted:

> "The validity of the claim is determined by the New York Courts in accordance with the substantive law of admiralty (general maritime law).

> *Rogers v. City of New York.* See also, *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942). *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372, 38 S. Ct. 501, 2 L. Ed. 1171 (1919). Therefore, general maritime law must be applied to determine whether or not the third cause of action of the amended complaint will stand." 264 F. Supp. 812.

It is thus apparent that the plaintiff's cause of action in the instant case is to be decided by the law governing the admiralty and maritime law. The validity of plaintiff's action in no way depends on any limitation statute of the State of Connecticut. The net effect of the *Workman* case and particularly *Frame* and *Rogers* is that the admiralty law will not be inhibited or hindered by time limitations, notices or special provisions concerning the presentation of claims and, as *Rogers* points out, the only defense allowed to a party insofar as the time for institution of suit is concerned, is laches. See also *Raymond International, Inc., v. M/T Dalzelleagle,* 336 F. Supp. 679 (S. D. N. Y. 1971), wherein Judge Lasker followed precisely the effect of the above cases in ruling on a motion by the Triborough Bridge and Tunnel Authority that it was not only immune from suit but that the third-party complaint did not comply with a notice requirement provided by the General Municipal Law.

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POINT VI

THE DEFENSE OF SOVEREIGN IMMUNITY

Only two cases were cited by the State of Connecticut in support of its motion to dismiss, *Huckins v. Board of Regents of Univ. of Mich.*, 263 F. Supp. 622 (E. D. Mich. 1967), relating to the general maritime law, and *Red Star Towing and Transportation Co. v. Dept. of Transportation of N. J.*, 423 F. 2d 104 (C. A. 3rd 1970), relating to the subject in general. That these cases are but the tip of the iceberg becomes apparent when one considers and reviews the various cases that have been decided on this point, most of recent vintage. Allied with *Red Star* are the following among others: *Intracoastal Transportation Co. v. Decatur County*, 482 F. 2d 361 (C. A. 5th 1973), *Burgess v. Tamano*, 382 F. Supp. 351 (D. Me. 1974), and *Dawkins v. Craig*, 483 F. 2d 1191 (C. A. 4th 1973). Virtually diametrically opposed are *Chesapeake Bay Bridge v. Lauritzen*, 404 F. 2d 1001 (C. A. 4th 1968), *Rivet v. East Point Marine Corp.*, 325 F. Supp. 1265 (S. D. Ala. 1971), *Rives v. Richmond Metropolitan Authority*, 359 F. Supp. 611 E. D. Va. 1973), *Guthrie v. Alabama Bi-Product Co.*, 328 F. Supp. 1140 (N. D. Ala. 1971), *State of Oregon v. Tug Go-Getter*, 299 F. Supp. 269 (D. Ore. 1969).

It is agreed that in the absence of its consent, a state not only is immune from suits brought against it by citizens of other states, U. S. Const. Amend. XI, but it is also immune from suits brought against it by its own citizens even when suit is based on issues arising under Federal law, *Parden v. Terminal Ry.*, 377 U. S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964). Whether states have given their consent to be sued in Federal District Courts and whether their alleged consent to be sued was intended to apply to any particular case, is considered to

be a matter of state law, *Ford Motor Co. v. Dept. of Treasury*, 323 U. S. 459, 65 S. Ct. 347, 89 L. Ed. 389 (1945). The most recent cases, however, hold that a state can waive its immunity from suit by knowingly and clearly entering an area regulated pursuant to its constitutional authority by Congress. Whether the state's action in so doing constitutes a waiver of its immunity is a question to be decided by federal law, *Parden v. Terminal Ry., supra, Petty v. Tennessee-Missouri Bridge Commission*, 359 U. S. 275, 79 S. Ct. 785, 3 L. Ed. 2d 804 (1958), *Huckins v. Board of Regents, supra, Chesapeake Bay Bridge v. Lauritzen, supra.*

Further indication that this activity was within the scope of congressional activity is the River and Harbors Act of 1899, 33 U.S.C. 401, *et seq.*, which provides for the obtaining of a federal permit for bridge building and prohibits unauthorized obstruction of navigation. In view of the literally millions of commuters, businesses, vessels and commercial activities which depend on the use of the Tomlinson Bridge, the State cannot seriously urge that the activities involved with the Tomlinson Bridge are not within the realm of congressional regulation. Certainly, the activities of the Tomlinson Bridge bring it within the realm of interstate commerce and subject it to federal law requirements.

In addition, it should be noted also that it has been held that the Rivers and Harbors Act creates causes of action on behalf of private persons, *Alameda Conservation Assoc. v. State of California*, 437 Fed. 2d 1087 (C. A. 9th 1971), cert. den'd 402 U. S. 908, 91 S. Ct. 1380. See also, *Sierra Club v. Leslie Salt Co.*, 354 F. Supp. 1099 (N. D. Cal. 1972).

The *Lauritzen* line of cases hold that when a state goes into a field which is expressly reserved by the Federal Constitution to federal and congressional control,

such as navigable waters, it must obey the same federal laws that any other entity going into that field must obey. The rationale for this was as stated in *Parden v. Terminal Ry., supra,* at p. 186:

> "Although the Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama, this Court has recognized that an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another State. *Hans v. Louisiana,* 123 U. S. 1, 33 L. Ed. 842, 10 S. Ct. 504; *Duhne v. New Jersey,* 251 U. S. 311, 64 L. Ed. 280, 40 S. Ct. 154; *Great Northern Life Ins. Co. v. Read,* 322 U. S. 47, 51, 88 L. Ed. 1121, 1124, 64 S. Ct. 873; *Fitts v. McGhee,* 172 U. S. 516, 524, 43 L. Ed. 535, 539, 19 S. Ct. 269. See also *Monaco v. Mississippi,* 292 U. S. 313, 78 L. Ed. 1282, 54 S. Ct. 745. Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.' *Hans v. Louisiana, supra,* 134 U. S. at 10, 33 L. Ed. at 845; see *Duhne v. New Jersey, supra,* 251 U. S. 311, 64 L. Ed. 280, 40 S. Ct. 154; *Smith v. Reeves,* 178 U. S. 436, 447-449, 44 L. Ed. 1140, 1145, 20 S. Ct. 919; *Ex parte New York,* 256 U. S. 490, 497-498, 65 L. Ed. 1057, 1060, 41 S. Ct. 588. But the immunity may of course be waived; the State's freedom from suit without its consent does not protect it from a suit to which it has consented. *Clark v. Barnard,* 108 U. S. 436, 447, 27 L. Ed. 780, 784, 2 S. Ct. 878; *Gunter v. Atlantic Coast Line R. Co.,* 200 U. S. 273, 284, 50 L. Ed. 477, 483, 26 S. Ct. 252; *Petty v. Tennessee-Missouri Bridge Comm'n,* 359 U. S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785."

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And at pp. 196-197:

> "The broad principle of the *Petty* case is thus applicable here: Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law. Here, as in *Petty*, the States by venturing into the congressional realm 'assume the conditions that Congress under the Constitution attached.' 359 U. S. at 281-282.
>
> Our conclusion that this suit may be maintained is in accord with the common sense of this Nation's federalism. A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. Cf. *South Carolina v. United States*, 199 U. S. 437, 463, 50 L. Ed. 261, 270, 271, 26 S. Ct. 110; *New York v. United States*, 326 U. S. 572, 90 L. Ed. 326, 66 S. Ct. 310."

The court below in *Lauritzen*, 259 F. Supp. 633 (E. D. Va. 1966), analyzed the issue as follows at pp. 636, 637:

> "It is not disputed that the Bridge and Tunnel District is a political subdivision of the State of Virginia and, under state law, such subdivisions have been held to be immune from any action predicated on tort liability even where the Act creating

> the District contains a 'sue and be sued' clause, as in the present case. • • • We think it clear that the basis of libelant's claim is a maritime tort. *Eastern Transportation Company v. United States,* 272 U. S. 675, 47 S. Ct. 289, 71 L. Ed. 472. A preliminary issue, therefore, is whether the state law should be applied or whether federal law is controlling, since Virginia law would appear to effectively uphold the defense of sovereign immunity.
>
> • • •
>
> Respondent does not dispute that it is subject to the federal laws pertaining to navigable waters, but it argues that these laws do not create any cause of action in favor of injured third parties such as the libelant here. It points out that the regulations prohibiting the obstruction of navigable waters do no more than establish a standard of care and give the United States the power of enforcement, whereas the Federal Employers' Liability Act, under which petitioners sued in the *Parden* case, expressly created a cause of action for injured employees against '(e)very common carrier by railroad while engaging in commerce between any of the several States • • •.' 45 U.S.C. §51.
>
> It is true that the federal navigation regulations do not expressly provide a cause of action for injured parties as does the FELA, but such liability is clearly implied. Even though it be conceded that the statutes pertaining to the protection of navigable waters, 33 U.S.C. §401 *et seq.*, are penal in nature, it is clear that civil liability may be derived therefrom, both in favor of the United States, *United States v. Perma Paving Co.,* 332 F. 2d 754 (2 Cir. 1964), and private parties, *Morania Barge No. 140, Inc., v. M. & J. Tracy, Inc.,* 312 F. 2d 78

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(2 Cir. 1962). Violation of the navigation laws gives rise to a presumption of negligence, which, if not rebutted, may result in liability to the negligent party. *Reading Co. v. Pope & Talbot, Inc.*, 192 F. Supp. 663 (E. D. Penn. 1961), aff'd 295 F. 2d 40 (3 Cir. 1961). We think it is evident that the regulations pertaining to the obstruction of navigable waters were manifestly intended for the protection of private parties such as the libelant here, even though the enforcement of these provisions was vested in the United States. *United States v. Republic Steel Corporation*, 362 U. S. 482, 80 S. Ct. 884, 4 L. Ed. 2d 903; *Texas & Pac. Ry. v. Rigsby*, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874; *United States v. State of California*, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567; *State of California v. Taylor*, 353 U. S. 553, 77 S. Ct. 1037, 1 L. Ed. 2d 1034.

• • •

But we perceive no sound reason for holding that a state has waived its immunity from suit where a federal law expressly grants a right of action, as in *Parden*, and denying such a waiver when civil liability clearly exists but it is not expressly mentioned, as in this case. The proper test, we believe, is whether the state has knowingly and directly entered a field which is subject to federal regulation, such as interstate or foreign commerce. If so, it must be deemed to have consented to suit to the same extent as a private individual. A contrary ruling would result in the same injustice which gave the Supreme Court cause for concern in the *Parden* case; namely, that injured parties would have a remedy when hurt by a private individual but would be remediless if the state, through its entry into

> the field of interstate or foreign commerce, happened to be the party at fault. When a state elects to enter the realm of interstate or foreign commerce it must be prepared to shoulder the attendant responsibility."

The line drawn between *Lauritzen* and *Red Star* does not appear to have been decided in this circuit. See *Connecticut Action Now, Inc., v. Roberts Plating Co.*, 457 Fed. 2d 81 (C. A. 2d 1972), where the court had before it the question of injunctive relief available to private persons under the Rivers and Harbors Act. The following was stated at p. 88:

> "Recent opinions have made it clear that the Federal Government may seek injunctive relief against conduct violating several provisions of the 1899 Act, including §407. *United States v. Republic Steel Corp.*, 362 U. S. 482, 80 S. Ct. 884, 4 L. Ed. 2d 903 (1960); *Wyandotte Transp. Co. v. United States*, 389 U. S. 191, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967); *United States v. Florida Power & Light Co.*, 311 F. Supp. 1391 (S. D. Fla. 1970); *Bass Anglers Sportsman's Soc. v. Scholze Tannery, Inc., supra.*, 329 F. Supp. 339, 347-348 (E. D. Tenn. 1971); *United States v. Armco Steel Corp.*, 3 E. R. C. 1067 (S. D. Tex. Sept. 17, 1971). In *United States v. Perma Paving Co.*, 332 F. 2d 754 (2nd Cir. 1964), this court held that the United States was entitled to recover money damages for the removal of an obstruction of a channel of a navigable stream caused by the defendant's misuse of riparian land. But *Perma Paving specifically reserved the issue 'whether the statute creates rights on behalf of persons injured by an obstruction to navigation'* (332 F. 2d at 758), and that question,

> together with the broader issue of the right of a self-appointed public representative to bring suit, *remains wholly undecided in this circuit.* * * *"* (italics supplied).

See also the comments of Judge Edelstein in *Citizens Committee for Hudson Valley v. Volpe,* 297 F. Supp. 809 (S.D.N.Y. 1969) concerning *Lauritzen* at pages 812 and 813.

Perhaps the answers to these diverging points of view lie in the Supreme Court's comments with respect to the common sense of this Nation's federalism in *Parden v. Terminal Ry., supra,* at page 197:

> "It would surprise our citizens, we think, to learn that petitioners, who in terms of the language and purposes of the FELA are on precisely the same footing as other railroad workers, must be denied the benefit of the Act simply because the railroad for which they work happens to be owned and operated by a State rather than a private corporation. It would be even more surprising to learn that the FELA does make the Terminal Railway 'liable' to petitioners, but, unfortunately, provides no means by which that liability may be enforced. Moreover, such a result would bear the seeds of a substantial impendiment to the efficient working of our federalism. States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation. See *South Carolina v. United States, supra,* 199 U. S. at 454-455, 50 L. Ed. at 266-267. * * *"*

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When one realizes the overwhelming number of bridges owned by railroads which are subject to identical regulations as is the Tomlinson Bridge as well as the overwhelming number of highway bridges owned by municipalities, see 33 C.F.R. 117.120, *supra*, or state or bi-state agencies, see *Conklin v. City of Norwalk, supra*, and *Raymond International, Inc. v. M/T Dalzelleagle, supra*, which do not enjoy immunity of any kind, it seems rather odd to find particular bridges, depending on their ownership, still claiming complete immunity from the acts of its employees in assisting navigation through the draw. There is no logical reason why state-owned bridges in Connecticut should enjoy complete immunity from their acts while other similar bridges, perhaps close by, are held accountable.

Consider also, what would happen if the Tomilson Bridge sustained damage because of a navigational accident such as being struck by a vessel. Precisely this occurred in May 1972 and is the subject of a lawsuit recently tried in the United States District Court for the Southern District of New York before Judge Lasker, *In re Tug Helen B. Moran, Inc.* and *In re Tug Devon* (consolidated causes, 72 Civ. 4633) wherein the state filed claim against the owners of two tugboats claiming extensive property damages. Cross-claims and counterclaims were also filed against the State of Connecticut both for actual damages sustained and for indemnity and the State of Connecticut interposed a defense of sovereign immunity.

Fortunately for the owners of the two tugs, it is likely that the State of Connecticut will not be successful in claiming its immunity since there appears to be ample authority that the State waived its immunity and voluntarily submitted to the Court's jurisdiction of any counterclaim that might be asserted against it, see *Burgess v.*

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M/T Tamano, supra. Unfortunately for plaintiff in this case, the State apparently sustained no physical damages and therefore will not sue to recover thereby and permit plaintiff to counterclaim for its damages. Such a situation should not exist in the present day and plaintiff respectfully requests that the State of Connecticut no longer be permitted to assert any claim of sovereign immunity in connection with the within cause of action.

CONCLUSION.

Defendant's motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure should be in all respects denied.

Respectfully submitted,

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Defendants' Reply Memorandum in Support of Motion to Dismiss.

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT.

The sole issue before the Court on defendants' motion is whether or not the State has impliedly waived sovereign immunity by virtue of its act in operating and maintaining a bridge over navigable waters. Other collateral issues set forth in plaintiff's memorandum in Points IV and V are inapposite to the central question and merely serve to obfuscate the issue.

With regard to Point IV, Connecticut General Statute, Section 4-141, *et seq.* (Claims Against the State) relates to procedures by which an individual may request that the State consent to suit through its commission on claims as though it were a private person. There is no indication in the complaint that any such procedure has been utilized or attempted by the plaintiff in this case, and the argument that this section of the statutes constitutes a waiver of sovereign immuniy by the State for all purposes is patently absurd. Indeed, in at least one case, the right to make such a claim was part of the rationale for dismissing a similar complaint. *Williamson Towing Co., Inc. v. State of Illinois,* 396 F. Supp. 431 (E. Ill. 1975).

Point V of the plaintiff's brief reviews the distinction between governmental immunity and sovereign immunity and analyzes those cases where municipalities have attempted to raise governmental immunity as a defense. Needless to say, a municipality may not insulate itself from suit by claiming sovereign immunity or Eleventh Amendment protection. However, that rule has no bearing in the instant case where the defendant is the State of Connecticut acting by and through the Department of Transportation. (See: Paragraph Fifth of the complaint) As such, the plaintiff's discussion of the applicability of

notice provisions and statutes of limitation against governmental authorities or municipalities can have no bearing or relevance to the instant action.

Point VI of plaintiff's memorandum cites most of the cases aligned on either side of the central issue. The plaintiff suggests that the two views are equally persuasive and that this Court should follow the *Lauritzen* line of cases as sovereign immunity is an inequitable and perhaps old-fashioned legal theory. Such is not the case.

The *Lauritzen* case has been eroded in both its reasoning and result by later cases and can no longer be relied upon. As noted in *Williamson Towing Co., Inc., v. State of Illinois, supra.*

> "Subsequent cases have disapproved of [the Lauritzen] reasoning, and this court feels that a closer examination of the *Parden* opinion and the most recent decisions of the Supreme Court in this area of the law fail to support the Lauritzen conclusion."

In construing *Parden v. Terminal Railway of Alabama State Docks Department,* 377 U. S. 184 (1964) upon which the Court in *Lauritzen* relied, there are three requirements which must be met before the State may be considered to have impliedly waived its Eleventh Amendment protection. These are (1) that the State conduct is in an area subject to federal regulation; (2) there exists a civil cause of action within the applicable federal statute in favor of a private individual; and (3) there is a clear Congressional intent within the statute to include states within the general class of defendants subject to civil liability. *Williamson Towing Co., Inc. v. State of Illinois, supra,* at page 436.

Further limitations have been put on any extension of the *Parden* rationale by comparing it to subsequent Supreme Court cases. See: *Intracoastal Transp., Inc.*

v. Decatur County, Georgia, 482 F. 2d 361 (5th Cir. 1973). Citing: *Employees of the Department of Public Health & Welfare, State of Missouri,* 411 U. S. 279 (1973). In *Employees,* Mr. Justice Douglas noticed that *Parden* involved a proprietary function (the operation of a railroad for profit) and not a governmental function as in the instant case. As such, he concluded:

> "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum."

In his concurring opinion, Mr. Justice Marshall found the impediment to suit to lie in the disability of the federal court rather than the absence of a right of an individual. He noted that the concept of implied consent or waiver relied upon in *Parden* approached the outer limit of the sort of voluntary choice generally associated with the concept of constitutional waiver and concluded that the constitutional limit upon federal judicial power barred a federal court action but left to the individual his right to assert the same claim in the state court. Under either view, there would appear to be no question that this Court does not have the power to entertain this suit.

Even the dissent in *Intracoastal Transp., Inc. v. Decatur County, Georgia, supra,* would apparently agree, on the facts of the instant case, that the defense of sovereign immunity could not be waived by implication. Judge Wisdom referring to the Supreme Court's opinion in *Employees* noted that no Congressional intent to lift

a state's immunity would be inferred absent specific language to that effect in the federal statute where (1) the financial burden to be placed upon the State would be great, and (2) where there existed alternative avenues for the enforcement of a private party's rights.

The plaintiff in the instant case had two options open to it, neither one of which were exercised. As it suggests in Point IV of its brief, it could have attempted to obtain consent from the Commission on Claim in accordance with Connecticut General Statutes, Section 4-141, *et seq.* Another possible approach would have been for it to take advantage of the State's limited waiver of immunity and bring an action pursuant to Section 13a-144 of the Connecticut General Statutes. That statute provides that a person injured through the neglect or default of an employee by means of any defective bridge may bring a civil action to recover damages against the Commissioner of Transportation if there is compliance with the notice provisions and other requirements set forth in the statute. The plaintiff apparently failed to exercise these existing options, but that is no ground for ignoring the concept of sovereign immunity or the Eleventh Amendment.

The specific regulatory scheme in this case is the same as that before the courts in *Intracoastal Transp., Inc. v. Decatur County, Georgia, supra,* and *Williamson Towing Co., Inc. v. State of Illinois, supra,* e. g. the Bridge Act of 1906 (Title 33 U.S.C. §491, *et seq.*) Title 33 U.S.C. §499 specifically relates to regulations for drawbridges and the penalties for violation. It provides for a fine of not more than $2,000.00 nor less than $1,000.00 and provides for the promulgation of rules and regulations by the Secretary of Transportation. "Persons" for the purposes of the Bridge Act are specifically defined in Title 33 U.S.C. §497:

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> "The word 'person' as used in Sections 491 to 498 of this Title, shall be construed to import both the singular and plural, as the case demands, and shall include municipalities, quasi-municipal corporations, corporations, companies, and associations."

It is clear from the face of the regulatory scheme that no civil cause of action is expressly given to private individuals under 33 U.S.C. §499 and that sovereign states are specifically excluded from the definition of persons as that term is used under the Act. As such, while there is no dispute that the State of Connecticut has entered into the federal sphere of interstate commerce by its operation and maintenance of the Tomlinson Bridge, the Bridge Act of 1906 fails to create a private civil cause of action in favor of those injured by violations of the Act and expressly excludes sovereign states from its application.

For the foregoing reasons, it is respectfully requested that the complaint be dismissed.

THE DEFENDANTS,
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376—Affidavit of Service by Mail The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

RED STAR TOWING

VS

CONNECTICUT KANELL

State of New York, County of New York, ss.:

AH HAROLD DUDASH , being duly sworn deposes and says that he is agent for McHugh Heckman, Smith & Leonard, the attorney for the above named appellant herein. That he is over 21 years of age, is not a party to the action and resides at 2346 Holland ave n BX, NY

That on the 28th day of January, 1977 , 19 , he served the within appellant's brief and Joint Appendix

upon the attorneys for the parties and at the addresses as specified below

Pullman, Comley Bradley & Reeves, 855 Main street, Bridgeport, Ct 06604

three copies of the appendix and three og the brief

by depositing to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 28th day of January, 1977, 1976

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977